No. 02-5664 (9)

AUG 19 2002

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IN THE

Supreme Court of the United States

Dr. Charles Thomas Sell, D.D.S.
Petitioner,

v.

United States of America,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR COGNITIVE LIBERTY & ETHICS IN SUPPORT OF THE PETITION FOR CERTIORARI

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I.
INTEREST OF AMICUS CURIAE

With the written consent of the parties reflected in letters lodged with the Clerk, undersigned counsel for the Center for Cognitive Liberty & Ethics (CCLE), submits this brief as *amicus curiae* in support of petitioner pursuant to Rule 37 of the Rules of Court.[1]

The CCLE is a nonprofit education, law, and policy center working in the public interest to foster cognitive liberty—the right of each individual to think independently, to use the full spectrum of his or her mind, and to have autonomy over his or her own brain chemistry. The CCLE encourages social policies that respect and protect the full potential and autonomy of the human intellect. The CCLE was an *amicus curiae* party to this case, on behalf of petitioner Dr. Sell, when Petition for Rehearing/Rehearing en banc was filed before the Eighth Circuit below.

As an organization charged with defending freedom of thought, the CCLE has a vital interest in this case because the forcible injection of a citizen with a mind-altering drug directly infringes on cognitive liberty and mental autonomy.

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[1] No counsel for a party authored this brief in whole or part, and no person or entity other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

The CCLE is deeply concerned that the decision below seriously compromises the core of the First Amendment and, if permitted to stand, will undermine the fundamental right of all citizens to have autonomy over their own minds and mental processes.

In particular, the CCLE seeks to assist the Court by demonstrating that the right at stake in this case is a fundamental First Amendment right. The CCLE seeks to show that more is at issue in this case than what courts have commonly termed "bodily integrity." At stake is an even more fundamental right, one which combines the liberty interest in bodily integrity with the fundamental right to freedom of thought. This combined right the CCLE terms "cognitive liberty."

Correctly characterizing the liberty interest at stake in this case is critical for determining the standard of review to be applied in this case and in similar cases in the future.

SUMMARY OF ARGUMENT

The CCLE submits that the court of appeals mischaracterized the fundamental right at issue in this case, and as a result, erred by applying an inappropriately low standard of review.

The fundamental right to control one's own intellect and mental processes is protected by the First Amendment, and is eviscerated if courts permit the government to forcibly drug citizens. If government agents, with the concurrence of the courts, can constitutionally order the forcible manipulation of Dr. Sell's mind in order that he may stand trial, then any accused defendant, who poses no danger to himself or others, is also at jeopardy of losing his or her First Amendment right to freedom of thought.

To be sure that our argument is correctly understood, the CCLE does not propose that the state cannot regulate the *behavior* of individuals, including the acts of individuals who are incoherent or who spit on, or otherwise assault, judges. We maintain that the state cannot, consistent with the First Amendment of the Constitution, forcibly manipulate the *mental states* of individuals.

ARGUMENTS

I. Freedom of Thought and Cognitive Liberty are Fundamental Rights Guaranteed by the First Amendment.

In declaring that the state may forcibly inject a nondangerous citizen with mind-altering drugs in order to make him "competent to stand trial," the Eighth Circuit's decision goes far beyond *any* holding of this Court

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concerning the right of the state to directly intrude into the mind of a citizen. The sweeping breadth of the Eighth Circuit's decision places freedom of thought in dire jeopardy, calling into question not only the Sixth Amendment right to a fair trial, but the very foundation of the First Amendment, including basic notions of individual freedom upon which this country was founded.

The CCLE submits that more than the defendant's liberty interest in bodily integrity is at stake in this case. Here, the state seeks to forcibly invade a nondangerous pretrial detainee's body and manipulate his brain chemistry *for the purpose of changing how he thinks*.[2] In other words, this case combines the issue of bodily integrity with the issue of freedom of thought, and thus raises what the CCLE terms a "cognitive liberty" issue.

While the Eighth Circuit acknowledged that Dr. Sell has a "significant liberty interest in refusing anti-psychotic medication" *United States v. Sell*, 282 F.3d 560, 568 (2002), the court grossly undervalued the individual interest at stake in this case. The right to freedom of thought is far more than

[2] This Court has described "antipsychotic" drugs as medications with the purpose "to alter the chemical balance in a patient's brain, leading to changes...in his or her cognitive processes." *Washington v. Harper*, 494 U.S. 210, 229 (1990). In his concurring opinion in *United States v. Riggins*, Justice Kennedy described antipsychotic drugs as "medications [that] restore normal thought processes...." *United States v. Riggins*, 504 U.S. 127, 141 (1992) (Kennedy, J., concurring).

"significant;" it is situated at the very core of what it means to be a free person in a civilized society, and is a fundamental right protected by the First Amendment.

The First Amendment to the United States Constitution, which Professor Laurence Tribe has called "the Constitution's most majestic guarantee,"[3] provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (U.S. Const. Amend. I.)

This Court has noted that while "[t]he First Amendment literally forbids the abridgment only of "speech," ... we have long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *see also, Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("[W]e have long eschewed any 'narrow, literal conception' of the [First] Amendment's terms, ...for the Framers were concerned with broad principles....").

This Court has repeatedly observed that there are derivative and corollary rights that are essential to effectuate

[3] Laurence Tribe, *American Constitutional Law*, Sec. 12-1, p. 785 (2nd ed. 1988).

the purposes of the First Amendment, or which are inherent in the rights expressly enumerated in the Amendment. For example, in *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965), Justice Brennan, in his concurring opinion explained:

> It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful.

Likewise, in *Globe, supra,* this Court observed that "[t]he First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe, supra*, 457 U.S. 596, 604. In 1982, this Court employed this reasoning to recognize a "right to receive information and ideas," locating the right as "an inherent corollary of the right of free speech and press" guaranteed by the First Amendment. *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion).

Freedom of thought, while not expressly guaranteed by the First Amendment is one of the equally fundamental rights necessary to make the express guarantees meaningful. As Justice Benjamin Cardozo extolled, "...freedom of thought...one may say...is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal." *Palko v. Connecticut,* 302 U.S. 319, 326-327 (1937).

Repeatedly, this Court has recognized that freedom of thought is one of the most elementary and important rights inherent in the First Amendment.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court invalidated a school requirement that compelled a flag salute on the ground that it was an unconstitutional invasion of "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from official control." *Id.* at 642. The First Amendment, declared this Court, gives a constitutional preference for "individual freedom of mind" over "officially disciplined uniformity for which history indicates a disappointing and disastrous end." *Id.* at 637. At the center of our American freedom, is the "freedom to be intellectually and spiritually diverse." *Id.* at 641. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds," this Court explained, "only at the price of occasional eccentricity and abnormal attitudes." *Id.* at 641-42.

This principle, that freedom of thought is central to the First Amendment and protected thereby, has guided other important decisions of this Court. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court invalidated a New Hampshire statute that required all noncommercial vehicle license plates to bear the state motto "Live Free or Die," finding the statute to be inconsistent with "the right of freedom of thought protected by the First Amendment." *Id.* at 714.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court invalidated a state statute forcing public school teachers to contribute money to a union that advanced political views. "[A]t the heart of the First Amendment," noted this Court, "is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234-235. This Court emphasized, "freedom of belief is no incidental or secondary aspect of the First Amendment's protections." *Id.* at 235.

In the instant case, the government is seeking to directly manipulate and modify Dr. Sell's thoughts and thought process by forcing him to take mind-altering "antipsychotic" drugs. This case thus concerns what the CCLE terms a "cognitive liberty" interest, an interest forged by the union of Dr. Sell's liberty interest in bodily integrity with his First Amendment right to freedom of thought. If "at the heart of the First Amendment is the notion that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State" (*Abood, supra*, at 234-235), then there can be no doubt that the government infringes on the First Amendment when it seeks to change Dr. Sell's thinking by forcibly changing his brain chemistry.

By altering a person's mind with the forced administration of drugs, the government commits an act of *cognitive* censorship and mental manipulation, an action surely more disfavored under the First Amendment than even the censorship of speech. A government that is permitted to manipulate a citizen's consciousness at its very roots—by forcing a person to take a mind-altering drug—need not censor speech, because it could prevent the ideas from ever occurring in the mind of the speaker. Chemical manipulation of the mind is, therefore, the ultimate prior restraint on speech.[4]

By forcing Dr. Sell to take a mind-altering drug against his will, the government is commandeering Dr. Sell's mind, and forcibly changing his very ability to formulate particular thoughts. By directly manipulating the manner in which Dr.

[4] "Any prior restraint on expression comes to…[the] Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Sell's brain processes information and formulates ideas, the government *ipso facto* manipulates and alters both the form and content of Dr. Sell's subsequent expression and thus renders the First Amendment's free speech guarantee meaningless. "The guarantee of free expression," notes Professor Tribe, "is inextricably linked to the protection and preservation of open and unfettered mental activity..." Laurence Tribe, *Rights of Privacy and Personhood*, American Constitutional Law, Sec. 15-7, at 1322 (2nd ed. 1988).[5]

In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court struck down a Georgia law that banned the private possession of obscene material for personal use, finding the law "wholly inconsistent with the philosophy of the First Amendment." *Id.* at 565-66. "Our whole constitutional heritage," explained this Court, "rebels at the thought of giving government the power to control men's minds." *Id.* at 565.

[5] Professor Emerson, a leading First Amendment scholar, makes the same point as Professor Tribe. Situating freedom of thought within the First Amendment, Professor Emerson explains:

> Belief...is not strictly "expression." Forming or holding a belief occurs prior to expression. But it is the first stage in the processes of expression, and it tends to progress into expression. Hence safeguarding the right to form and hold beliefs is essential in maintaining a system of freedom of expression. Freedom of belief, therefore, must be held included within the protection of the First Amendment. T. Emerson, *The System of Freedom of Expression* 21-22 (1970).

Justice Harlan, concurring in *United States v. Reidel*, 402 U.S. 351 (1971), characterized the Constitutional right protected in *Stanley* as "the First Amendment right of the individual to be free from governmental programs of thought control, however such programs might be justified in terms of permissible state objectives," and as the "freedom from governmental manipulation of the content of a man's mind...." *Id.* at 359 (Harlan J., concurring).

It is impossible to reconcile a First Amendment aversion to "giving government the power to control men's minds" (*Stanley, supra*) with the actions intended by the government in the instant case. Indeed, it is difficult to imagine a governmental action more offensive to the First Amendment's protection of freedom of thought, than the government forcibly injecting a nondangerous citizen with a mind-altering drug. If, as Justice Harlan explained in *Reidel*, there is a "First Amendment right of the individual to be free from governmental programs of thought control," then that right is clearly at stake in this case.

The Eighth Circuit's decision failed to recognize that the government's action in the instant case infringes on Dr. Sell's First Amendment right to freedom of thought. Forcibly injecting Dr. Sell with a mind-altering drug infringes on one of the most primary rights imaginable: the right to cognitive liberty and autonomy. This Court should grant the petition in

order to articulate the fundamental First Amendment nature of Dr. Sell's right to cognitive liberty.

Vigorous protection of cognitive liberty is particularly important today, as pharmaceutical companies increasingly develop and market new drugs aimed at modulating consciousness by modifying brain chemistry. The sale of Prozac™ and similar antidepressant drugs is currently one of the most profitable segments of the pharmaceutical drug industry. According to IMS Health, a fifty-year-old company specializing in pharmaceutical market intelligence and analyses, "antidepressants, the #3-ranked therapy class worldwide, experienced 18 percent sales growth in 2000, to $13.4 billion or 4.2 percent of all audited global pharmaceutical sales."[6] Sales of "anti-psychotic" drugs are currently the eighth largest therapy class of drugs with worldwide sales of $6 billion in the year 2000, a 22 percent increase in sales over the previous year.[7]

[6] IMS Health, *Antidepressants*, a summary of which is available online at: http://www.imshealth.com/public/structure/navcontent/1,3272,1034-1034-0,00.html.

[7] See IMS Health, *Antipsychotics*, a summary of which is available online at: http://www.imshealth.com/public/structure/navcontent/1,3272,1035-1035-0,00.html. A report published by the Lewin Group in January 2000, found that in 1998, antidepressants and antipsychotics accounted for 9% of Medicaid prescriptions. The same report found that within the Medicaid program alone, "Antidepressant prescriptions totaled 19 million in 1998...[and] [a]ntipsychotic prescriptions totaled 11 million in 1998." (Lewin Group, *Access and Utilization of New Antidepressant and Antipsychotic Medications* (Jan. 2000), prepared under contract for the

While the development of such drugs is to be applauded for their potential to aid millions of suffering Americans who *voluntarily* take them, the instant case raises the chillingly dark prospect of the government *forcibly* employing these new drugs to chemically alter the way that certain people think.[8]

The instant case thus raises significant theoretical constitutional issues with enormous practical implications. In the context of the ever-increasing ability to pharmacologically intervene in the minds of Americans, this case presents the Court with the timely and extremely important opportunity to articulate some unequivocal rules that respect freedom of thought and cognitive liberty. The CCLE

Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, and The National Institute for Mental health, Department of Health and Human Services. Available online at: http://aspe.hhs.gov/health/reports/Psychmedaccess/

According to Datamonitor, "Antidepressants have become a key focus for pharmaceutical manufacturers due to the huge growth in the market instigated by the launch of Prozac™ in the 1980s. Due to their expansion into new markets away from depression, the therapy class is now valued at $14bn and is set to continue expanding despite the upcoming patent loss of numerous key products." Datamonitor, *Market Dynamics 2001: Antidepressants*, Report - DMHC1725 (Dec. 21, 2001). Datamonitor forecasts that the demand for antidepressants will continue to grow, and estimates the market value to reach $18.3 billion by 2008. Ibid.

[8] The former Soviet Union had no First Amendment equivalent. It was not uncommon for prison psychiatrists to forcibly drug political dissidents after labeling them "mentally ill." *See*, Sidney Bloch & Peter Reddaway, *Psychiatric Terror: How Soviet Psychiatry Is Used to Suppress Dissent* (1977); Clarity, *A Freed Dissident Says Soviet Doctors Sought to Break His Political Beliefs*, New York Times (Feb 4, 1976) A1, 8.

respectfully urges this Court to grant the petition for certiorari.

II. Government Action that Substantially Infringes Upon the First Amendment Right to Cognitive Liberty Should, at the Very Least, be Subject to Strict Scrutiny.

Forcing a nondangerous pretrial detainee to take a mind-altering drug violates the First Amendment right to cognitive liberty. The forcible administration of so-called "anti-psychotic" medication is not an effort to control a person's behavior, with merely an incidental effect on the person's thinking. It is an effort aimed *directly* at changing the person's *mind and mental processes*, by forcibly manipulating his or her brain chemistry. Such a government invasion of bodily integrity—one aimed at directly manipulating the person's thoughts and thinking processes—infringes on the First Amendment and must be judged under no less a standard than strict scrutiny.

In reaching its holding that Dr. Sell may be forcibly injected with mind-altering drugs, the court of appeal rejected application of the strict scrutiny standard of review. *Sell, supra*, 283 F.3d at p. 568. In applying a lesser standard of review, the court of appeals misread this Court's decision in *United States v. Riggins*, 504 U.S. 127 (1992), and, ultimately, failed to apply the appropriately strict standard for judging a First Amendment cognitive liberty infringement.

The court of appeals' reliance on *Riggins*, for the proposition that strict scrutiny is not demanded in the instant case, is misplaced. In *Riggins*, this Court expressly refused to determine the standard of review to be applied when a nondangerous pre-trial detainee is force-drugged by the government. "We have no occasion," wrote this Court, "to prescribe such substantive standards...." *Riggins, supra*, 504 U.S. at p. 136.

The instant case provides the Court with an opportunity to articulate the fundamental First Amendment nature of the right to cognitive liberty, and the relationship of this right to a government effort to forcibly modify the brain chemistry of a nondangerous pretrial detainee. The instant case is striking for the factual finding that *Dr. Sell does not pose a danger to himself or to others. Sell, supra*, 283 F.3d at p. 565 ("Upon review, we agree that the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center"). The sole government interest offered as justification for forcibly drugging Dr. Sell is the state's "interest in bringing a defendant to trial." *Sell, supra*, 283 F.3d at p. 568.

Given that the forced-drugging of Dr. Sell is a direct effort to alter the content and form of his thoughts—the

essential substrate for free speech and expression—the correct standard is strict scrutiny, at the very least. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest...can justify limiting First Amendment freedoms"); *United States v. Brandon*, 158 F.3d 947 (6th Cir. 1998) ("to medicate a non-dangerous pretrial detainee in order to render him competent to stand trial...the government must satisfy strict scrutiny review...").

Applying a lesser standard, as did the Eighth Circuit, was erroneous, and places in substantial jeopardy the fundamental right of all Americans to freedom of thought and cognitive liberty. This Court should grant the petition in order to resolve the current standard of review in light of the fundamental First Amendment right at stake.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to grant the petition for certiorari.

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